2013 IL App (2d) 130294-U
No. 02-13-0294
Order filed September 30, 2013



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | | |
|---|---|---|
| EDWARD J. GIL., JR., | ) | Appeal from the Circuit Court |
| | ) | of McHenry County. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 09-CH-2117 |
| | ) | |
| PATRICIA WISKERCHEN, STEVE WISKERCHEN and McHENRY COUNTY, a body politic, | ) | Honorable |
| | ) | Thomas A. Meyer, |
| Defendants-Appellants. | ) | Judge, Presiding. |

JUSTICE HUDSON delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed plaintiff's claim seeking *mandamus* where plaintiff sought to compel county to perform nondiscretionary act.

¶ 2 I. INTRODUCTION

¶ 3 Plaintiff, Edward J. Gil, Jr., appeals the dismissal of Count II of his complaint, which was directed against defendant, McHenry County. In Count II, Gil sought a writ of *mandamus* directing the county to "enforce and cure violations" of its zoning ordinance. Count I is directed at Patricia

and Steve Wiskerchen, adjacent property owners who are not involved in this appeal (we have jurisdiction in accordance with Supreme Court Rule 304(a) (eff. February 26, 2010)). The trial court dismissed Count II with prejudice, citing section 2-615(e) of the Civil Practice Law (735 ILCS 5/2-615(e) (West 2012)). For the reasons that follow, we affirm.

¶ 4 The parties are aware of the facts, and we will not set them forth in detail here; however, we provide the following background to facilitate an understanding of this order. In 1998, plaintiff sold several lots to the Wiskerchens' predecessors in interest. Plaintiff retained one lot, which provides access to a lake. One of plaintiff's predecessors, Julie Kitsberg, built a house and garage on a parcel adjacent to the one retained by plaintiff; however, she did not obtain a building permit and the garage encroached on plaintiff's property. Following legal action by the county, Kitsberg removed an addition to the house and the garage, but she left the foundation of the garage (a concrete slab) in place. Plaintiff alleges the slab violates setback requirements and extends 2.45 feet onto his property. In his brief, plaintiff represents that Kitsberg abandoned the property and it was foreclosed on. The Wiskershens bought the parcel from the bank. In August 2012, the McHenry County Department of Planning and Development notified the Wiskershens that the slab constituted an unauthorized fill in a floodplain. In response, the Wiskershens cut off about two feet of the slab. The portion removed was on the Wiskershens' property.

¶ 5 We initially note that, despite the trial court's dismissal being made pursuant to section 2-615(e), the parties' initial arguments focus on whether plaintiff's claim was timely, which would implicate section 2-619(a)(5) (West 2012)). A section 2-615 motion "admits all well-pleaded facts and attacks the legal sufficiency of a complaint." *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 674 (2003). Conversely, section 2-619 permits, *inter alia*, dismissal of a claim where

"the action was not commenced within the time limited by law." 735 ILCS 5/2-619(A)(5) (West 2012). Our review, however, is *de novo* under either section. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. In any event, we find that this count was properly dismissed.

¶ 6 Putting aside the question of the timeliness of plaintiff's claim, plaintiff is asking us to order McHenry County to perform a discretionary action. This is not an appropriate use of a writ of *mandamus*. *Turner-El v. West*, 349 Ill. App. 3d 475, 480 (2004). Rather, "*mandamus* is an extraordinary remedy, through which a public official can be compelled to perform a ministerial duty." *Lombard Historical Comm'n v. Village of Lombard*, 366 Ill. App. 3d 715, 719 (2006). A court will not issue a writ of *mandamus* "unless there is a clear legal right to the performance demanded." *First National Bank of Joliet v. County of Grundy*, 197 Ill. App. 3d 660, 665 (1990). *Mandamus* should not be used in doubtful cases. *Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago*, 97 Ill. App. 3d 340, 346 (1981). As the appellant, plaintiff bears the burden of establishing that the trial court erred. *TSP-HOPE, INC. V. HOME INNOVATORS OF ILLINOIS, LLC, -Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008).

¶ 7 Here, plaintiff asks that "McHenry County be required to enforce and cure the violations of the Zoning Ordinance adopted by McHenry County." The McHenry County Zoning Ordinance provides that in the event of a violation "the proper authorities of the County, or any person, the value or use of whose property is or may be affected by such violation, in addition to other remedies, *may* institute any appropriate action." (Emphasis added.) McHenry County Zoning Ordinance § 811.2 (eff. September 15, 2009). The use of the term "may" indicates that the decision to institute an action is discretionary. *Jamison v. City of Zion*, 359 Ill. App. 3d 268, 270 (2005) ("We agree with

the trial court that the ordinance providing that the city 'may' abate an obstruction gives the city discretion whether to do so. Therefore, the ordinance does not furnish a basis for plaintiff to seek *mandamus* against the city.").

¶ 8 Furthermore, it is axiomatic that the decision to enforce an ordinance is discretionary in nature. See, e.g., *McClaughry v. Village of Antioch*, 296 Ill. App. 3d 636, 645 (1998) ("Therefore, as the enforcement of the nuisance ordinance in this case was a discretionary duty, the plaintiffs are not entitled to a writ of *mandamus*."). Similarly, the decision to negotiate or settle a case is discretionary as well. *People ex rel. Devine v. Murphy*, 181 Ill. 2d 522, 539 (1998). Thus, plaintiff's request is beyond the scope of a *mandamus* action.

¶ 9 Plaintiff attempts to avoid this result by pointing out that the County had previously instituted and completed an action against Kitsberg (the Wiskerchens' predecessor) and, at this point, all that remains is to enforce that judgment. Plaintiff cites nothing stating that the enforcement of a judgment is a ministerial act. He does rely on a passage from the Zoning Ordinance, which states:

> "Failure to comply with any of the requirements of this ordinance shall constitute a petty offense, and any person upon conviction thereof shall be fined not more than five hundred (500) dollars for each offense. *Each week the violation continues shall be considered a separate offense*." (Emphasis added.) McHenry County Zoning Ordinance § 811.1 (eff. September 15, 2009).

Specifically, plaintiff sets forth the italicized language in his brief. Nothing in this passage constrains the discretion of McHenry County to enforce the Zoning Ordinance. It simply states that each violation shall be considered a separate offense for each week it continues; it does not state that

each separate offense must be prosecuted. In other words, it provides no support for plaintiff's position.

¶ 10 Having provided no pertinent authority to establish that the acts plaintiff seeks to compel the County to perform are ministerial, plaintiff has not carried his burden of showing error on appeal (*TSP-Hope, Inc.*, 382 Ill. App. 3d at 1173). In light of this holding, we need not consider whether plaintiff's claim was timely. We affirm the decision of the trial court dismissing the second count of plaintiff's complaint.

¶ 11 Affirmed.